

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO, CALIFORNIA

SANDRA PARKER, CLYDE GIBB, AND  
FORT SUTTER COMPANY, d/b/a BEST  
WESTERN SUTTER HOUSE

and

Case 20-CA-34827

UNITE HERE! LOCAL 49

**Cecily A. Vix**, for the General Counsel.

**E. A. Hubbert**, of Sacramento, California, for the Respondent.

DECISION

Statement of the Case

**JAMES M. KENNEDY, Administrative Law Judge.** This case was tried in Sacramento, California, on July 13, 2010, pursuant to a complaint issued on February 26, 2010, by the Regional Director for Region 20. It is based upon an unfair labor practice charge filed on December 18, 2009, by Unite Here! Local 49 (the Union) and alleges that Sandra Parker, Clyde Gibb, and Fort Sutter Company, d/b/a Best Western Sutter House (the Hotel or the Respondent) has committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Respondent denies the allegations. The General Counsel and the Respondent have filed posthearing briefs which have been carefully considered.

Issues

The principal issue presented here is whether the General Counsel has proven the Respondent discharged its employee Aaron Baikie-Rick on December 14, 2009,<sup>1</sup> in violation of Section 8(a)(3) and (1) of the National Labor Relations Act because of his union activities. Issues of credibility are limited and in large part the motive behind the Respondent's decision can be seen from the testimony and behavior of the Respondent's managing partner, Sandra Parker.

I. Jurisdiction

The Respondent operates a medium-sized hotel in downtown Sacramento known as the Best Western Sutter House. It does business as a partnership consisting of Sandra Parker, Clyde Gibb, and Fort Sutter Company. The Hotel has approximately 100 rooms. It admits that during 2009, its gross volume of business exceeded \$500,000 and it purchased goods

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<sup>1</sup> All dates are 2009, unless otherwise indicated.

originating outside California valued in excess of \$5000. It therefore admits, and I find, that it is an employer engaged in interstate commerce as defined by Section 2(2), (6), and (7) of the Act. It also admits, and I find, that Unite Here! Local 49 is a labor organization within the meaning of Section 2(5) of the Act.

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## II. The Alleged Unfair Labor Practice

### *A. Preliminaries*

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The Respondent and the Union have had a long, peaceful, and reasonably productive relationship. The Union (through predecessors) was recognized as the 9(a) representative of its housekeepers and front desk employees some 35 years ago. Its manager, Sandra Parker, serves as a trustee of the joint pension plan. Until 2009, matters were amicable and had a family atmosphere. The Hotel was part of a group of Sacramento hotels which generally signed the same collective-bargaining contract. The Union did not target it as a lead hotel for bargaining purposes and Parker and her partners generally acquiesced to whatever the industry standard became. The Respondent's employees were not generally involved in the process.

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The Hotel has about 20 employees. Six work the front desk while the remainder is housekeepers. In 2009, as matters developed here, the managerial staff consisted of Parker, Sales Manager Doris Gray, and Executive Supervisor Anita Reyes. Gray is relatively new, hired in May. Reyes has 26 years with the Respondent and seems to occupy a dual space connected to the bargaining unit employees she supervises. She is clearly a 2(11) supervisor, but she also sits on the Union's bargaining committee to no one's concern.

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In May, the collective-bargain contract expired. According to desk clerk Aaron Baikie-Rick, several months before that happened one of the union officials asked him to become active in the Union. He agreed and began going to union meetings, rallies, and sitting in on negotiations with other hotels. Baikie-Rick at that point had worked for the Respondent for 4-1/2 years as a desk clerk. The Union's purpose was to train Baikie-Rick in the collective-bargaining process and to re-ignite the employees' interest in union affairs. Others were chosen as well. Baikie-Rick says he began spending about 16 hours a week on union matters.

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After a time, a negotiating committee of the Respondent's employees was formed. The employee members were Baikie-Rick, Jill Stamey, Anita Reyes, and Carol Vaiza.

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Through the efforts of union official Karl Neubuerger, a first negotiation meeting was scheduled for August 4 at the hotel. Neubuerger, his assistant, Christian Rak, and the employee committee arrived at the appointed time, but Parker did not appear. A few days later, a delegation of employees led by Baikie-Rick spoke to her, expressing disappointment that she had not met with them. Both he and some of the others told her they thought she was being disrespectful. Baikie-Rick observed that he had lost earnings because he had missed a shift to attend the meeting. Parker apologized. Baikie-Rick says she told them that she had been in Los Angeles and had forgotten. Parker testified she had just learned her elderly father had become terminally ill with cancer and she had dropped everything to rush to Roseville to be with him. Whether she went to Roseville (20 miles distant) or Los Angeles (400 miles distant) seems to be of little moment; either way, she missed the meeting without any call or explanation.

A second meeting was arranged toward the end of August. This time Parker was present. Demands were made which she found uncomfortable. No progress was made and she hired an attorney for the next session. Baikie-Rick testified:

5 This negotiation was where the Employer presented their counter-proposal. The lawyer talked for the Employer. The Employer rejected the Union proposal, and, in particular, the lawyer talked to -- addressed the employees. He told us that while we were considered very valuable employees, that our first duty was to ourselves, and if we were not happy, we could and should go elsewhere. There were lots of other eager people out there who wanted our jobs.

10 The Respondent has made no effort to dispute this testimony. Not only is a remark of this nature not conducive to good-faith bargaining, it probably qualifies as an 8(a)(1) threat; certainly it is demonstrative of union animus. Give and take is one thing; an invitation to quit over issues of contract resolution is another. The first is banter; the second is coercion. The lawyer's suggestion that those union-represented employees who were not happy with the way things were going could always leave—that there were people who would gladly take their jobs is the latter. See, for example, *Armstrong Machine Co.*, 343 NLRB 1149, 1151 (2004); *Ra-Rich Mfg. Corp.*, 120 NLRB 503, 506 (1958), *enfd.* 276 F.2d 461 (2d Cir. 1960); *Reliable Electric Co.*, 286 NLRB 834 (1987). Choices such as the one offered by the attorney are well within the language of coercion found in Section 8(a)(1).<sup>2</sup>

20 This attitude led to another delegation, led by Baikie-Rick. This one missed Parker who was absent and the group ended up speaking with Gray, who really had nothing to do or say about the matter, though she dutifully reported it to Parker. Baikie-Rick: "I told her that we, the Union, wanted to let Sandy know that we considered the contract very important. And we were willing to—we were willing to work however hard we needed to in order to get it . . . she told us that she would certainly pass it on to Sandy, and she thought what we were saying was interesting."

30 When no contract resulted from additional negotiations, the Union decided to up the ante. On Saturday, December 5, Baikie-Rick and some of the other committee members began leafleting the Hotel. It was a busy weekend and the Hotel was sold out. Baikie-Rick manned the front entrance. The first flyer, over a photo of Baikie-Rick, said: "[W]e deserve seniority rights in scheduling." The second urged guests to "[C]all hotel management and tell them to settle a fair union contract."

### 35 *B. Baikie-Rick's Discharge*

40 On December 5, when the leafleting was underway, neither Parker nor Gray was at the Hotel. In the following few days, Parker learned from a client about the leafleting. Reyes says Parker asked if it had occurred on the property; Reyes relied that it had. Parker then asked Reyes who was involved and Reyes replied that Baikie-Rick and other committee members

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45 <sup>2</sup> Sec. 8(a)(1) states: "It shall be an unfair labor practice for an employer to—interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 7, of course states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

were responsible. The process repeated when a customer told her she thought it was improper of the employees to conduct the leafleting when Parker wasn't there.

Later, Reyes told front desk clerk Bill Moen that Parker was unhappy over the fact that leaflets had been passed out on her property. Reyes repeated something similar to a group of employees. Parker herself conceded that there had never before been the level of union activity as in 2009 over the contract negotiations—including the office confrontations and the leafleting. A week after learning of the leafleting, she fired Baikie-Rick.

The discharge itself arose over a Christmas Day work schedule. Christmas in 2009 fell on a Friday, normally Baikie-Rick's day off. (He regularly worked the Monday and Tuesday swing shifts and the Saturday-Sunday day shifts.) In the past, Moen had been given the responsibility for shift assignments, but there was really little for him to do unless someone had to miss a shift. Everyone had a set schedule. There was a calendar which Moen used to remind everyone of the routine. Usually, changes were handled informally. But, with the arrival of Gray on the scene, things were changed. She wanted to know who was working, so while she had no problem with the set schedule, she wanted to formalize any deviations. She set up a system whereby requests for shift changes needed to be approved, and in late August created a written procedure calling for the approval of any changes by either herself or Parker.

In September, Moen utilized the procedure to obtain time off for 4 days in early October. Later, in October, he submitted a request for time off from December 23–26. In order to justify it, he also put together a proposed holiday schedule and attached it to his request. In that schedule, he had filled all shifts without requiring overtime and had maintained Baikie-Rick's schedule for Fridays, meaning he did not schedule Baikie-Rick for work that day. At some point in early December, part-time (Sunday only) clerk Tommi Jordan became seriously ill and unable to work at all for several months. Even so, Moen said he could work Jordan's Sunday shift himself, either before or after Christmas. On October 19 and again on November 2, Gray made a note in the front desk log book advising clerks to submit any proposed changes in the holiday schedule. No one did. At one point, Gray asked Baikie-Rick if he had a copy of Moen's proposed schedule, saying she had mislaid hers. Other than that, he says he had no conversations with Gray about the holiday schedule. There was no reason for him to do so, as he was confident that he would have Christmas off, his regular Friday. Somewhat improbably, Gray says her conversation with Baikie-Rick dealt with the fact that she needed him to work that Friday and there is a memo to Parker in evidence which vaguely suggests that was so. The memo (GC Exh. 11), is not as sanguine as her testimony. Undated, it appears to have been written after Baikie-Rick filed his written request on December 13 to have the Christmas Friday off. What is clear is that on December 10, Gray had changed the schedule and for the first time had put Baikie-Rick down to work the December 25 day shift. Baikie-Rick was off work until December 13, so he did not see the change until that day; when he saw the change he immediately wrote his request for a change, using the newly installed procedure for doing so. At the bottom he said he would be out of town with his family that day. He also added a respectful second page in which he explained that the Friday was his normal day off and he had made plans in accordance with his usual schedule. He offered to work instead either the morning or evening shift on December 23 and the morning shift of December 24. He thanked the Company for its consideration.

Gray bucked the matter to Parker. Curiously, however, Gray was already prepared with Baikie-Rick's replacement. On December 14, Parker, in response to Baikie-Rick's request, rather than dealing with the practicalities of the matter, made an immediate decision to

discharge him. She asked Gray if she knew of anyone who wanted to work the front desk; Gray replied that she did, a woman named “Vicky.” That same day, Parker interviewed and hired Vicky.

5           Upon doing so, she called Baikie-Rick and told him he was fired.<sup>3</sup> He responded that if he had known his job was at stake, he would certainly drop the family matter and work the Christmas shift. Parker told him it was too late. She had his check ready.

10           At the hearing, Parker added some additional reasons for firing Baikie-Rick. I decline to get into them in any meaningful way. If they had been actual reasons,<sup>4</sup> and not after-the-fact justifications, Gray would not have been prepared with a replacement and Parker would not have interviewed and hired Vicky in the fashion she did.

### Analysis and Conclusions

15           Beyond determining a prima facie case, there is very little that needs to be done here as a matter of legal analysis. The elements of an 8(a)(3) violation are present. Baikie-Rick became an active unionist, heightening not only his own participation but becoming involved not only with the Respondent but with the hotel industry in the community. He was the perceived  
20 leader of the reactivation of the movement and was willing to be the in-house spokesman for the union delegations. He was viewed as a primary leafleteer, having sought the publicity of putting his picture on one of the leaflets. His activism provoked Parker into inquiring of Reyes who was involved, and Reyes gave him Baikie-Rick’s name as a prominent participant. Parker clearly was aware of Baikie-Rick’s status as a leader.

25           Union animus is also present. It first showed itself during collective bargaining when the Respondent’s attorney gave the committee the classic choice of working union under nonoptimal conditions (wage freeze) or finding another job. This was a choice between a rock and hard place, suggesting that collective bargaining would not result in better conditions.  
30 Although not alleged to be violative of Section 8(a)(1), though it could have been, I choose only to observe that it qualifies as union animus.

35           Animus can also be seen rather transparently through the Gray-Parker dynamic in how they handled Baikie-Rick’s request for his regular day off. The first question, not satisfactorily addressed by the Respondent, is: Why was Parker already prepared with Baikie-Rick’s replacement when she called him? Was a plan to get rid of him already in motion? I find it was, because Parker never really had any intention of working the matter out. Her first choice was to fire Baikie-Rick, not to find a way to accommodate all interests. In this regard, she ignored Moen’s offer to step up and never determined the availability of anyone else. Given the fact that  
40 the stricken Tommi Jordan was a part timer who only worked Sundays, why was her position

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45           <sup>3</sup> Parker gave inconsistent testimony regarding when she made the decision to fire Baikie-Rick. First she said it was when she received the request for the day off. Then she said it was when she talked to him on the phone and he said he would not work Christmas. Then she reverted to the first version. She also said that she made the decision after consulting with counsel, which suggests that she made it when she got the time off request.

<sup>4</sup> These involve writeups which don’t hold up under much scrutiny—a group sale which perhaps should have been handled by Gray, who wasn’t on duty when the inquiry came in and an inconsequential concern over the way Baikie-Rick had handled a false fire alarm. Parker also added some incidents which were never raised with Baikie-Rick. Similarly, she ignored the positive customer comments he had received.

not addressed? Finding a replacement for her would have been the obvious starting point. Beyond that, Moen's original schedule had found a way for fellow clerks Hamlin<sup>5</sup> and Lopez to have worked. Why not discuss the matter with Moen who had the best handle on the matter? Indeed, why not go to Baikie-Rick himself and tell him he was needed for Christmas Day, even though it was his regular day off? Are Parker and Gray without skills of persuasion?

Finally, the timing of the discharge, only a week after Parker learned of the leafleting incident, connects the discharge in a temporal way to Baikie-Rick's union activity.

Even if the attorney's coercive remark to the committee is given only discounted weight, Parker's unnecessarily hasty and sharp response here clearly demonstrates that she believed she created or had been provided with a vehicle to get rid of a union activist who had caused her embarrassment and discomfort involving collective bargaining with her own employees. Those employees had stood up and shaken off their docile past, a change which Parker did not want to be forced to address. Putting a stop to that activity had become important to her. Accordingly, she was not about to let an opportunity pass which she no doubt thought could lead to a return to the milder times of the past. Baikie-Rick's departure would be a good first step to that end.

Gray's preparedness with a substitute suggests she was in on the plan to get rid of Baikie-Rick, perhaps from the outset. After all, she had been the one to whom his delegation had gone in Parker's absence. She was Parker's primary assistant and she was the one who had jiggered the schedule leading to the problem in the first place. She was no bystander.

Discharging Baikie-Rick on December 14 completed the elements of an 8(a)(3) unlawful discharge. The prima facie case is manifest.

Since the Respondent took no reasonable steps to address the dilemma in which it had placed Baikie-Rick, its arguments in support of a nondiscriminatory motivation do not stand; indeed, they do not get out of the starting gate. When Parker told Baikie-Rick he was discharged, she told him it was for refusing to work on Christmas. Not until she began defending the charges did she find the reasons she now advances: the previous writeups. Not only are these after thoughts, they are unpersuasive on their own terms as discussed above.

Accordingly, I find that the General Counsel has proven that the Respondent discharged Baikie-Rick because of his union activism, including his participation in the collective-bargaining process and because he served as a prominent leafleteer in protesting the Respondent's stance in the collective-bargaining process. The discharge violated Section 8(a)(3) and(1) of the Act.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. And, as the Respondent discriminatorily discharged Baikie-Rick, it will be ordered to offer him immediate reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily interest on those amounts as computed in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010). Furthermore, it shall be

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<sup>5</sup> Hamlin was a night auditor who pulled front desk shifts.

required to expunge from Baikie-Rick's personnel file any reference to his illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I make the following.

#### Conclusions of Law

1. The Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.

2. Unite Here! Local 49 is a labor organization within the meaning of § 2(5) of the Act.

3. On December 14, 2009, Respondent violated §8(a)(3) and (1) of the Act when it discharged its employee Aaron Baikie-Rick.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Sandra Parker, Clyde Gibb, and Fort Sutter Company, d/b/a Best Western Sutter House, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they engage in activity protected by §7 of the Act, including lawful activity on behalf of any labor union, including Unite Here! Local 49.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Aaron Baikie-Rick full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other benefits, rights or privileges previously enjoyed.

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(b) Make Aaron Baikie-Rick whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of this Order, remove from its files any reference to Baikie-Rick's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

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(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its hotel in Sacramento, California, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>[8]</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 2009.

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<sup>7</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

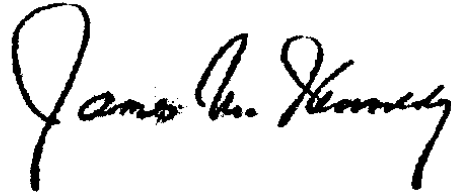
<sup>8</sup> The language requiring electronic posting of the notice is pursuant to the Board's policy change as set forth in *J. Picini Flooring*, 356 NLRB No. 9, sl. op. at 3 (October 22, 2010).



(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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A handwritten signature in black ink, appearing to read "James M. Kennedy". The signature is fluid and cursive, with the first name "James" being more prominent.

James M. Kennedy  
Administrative Law Judge

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Dated, Washington, D.C., November 29, 2010

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## Appendix

Notice to Employees  
Posted By Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

- ◆ Form, join or assist a union
- ◆ Choose representatives to bargain with us on your behalf
- ◆ Act together with other employees for your benefit and protection
- ◆ Choose not to engage in any of these protected activities.

**WE WILL NOT** discharge or discipline employees when their activities are protected by Section 7 of the Act, including activity on behalf of the **Unite Here! Local 49**, or any other union.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** offer **Aaron Baikie-Rick** immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

**WE WILL** make him whole for any earnings and other benefits she may have lost as a result of our discrimination against him, plus interest compounded daily.

**WE WILL**, within 14 days, remove from the our files any reference to **Aaron Baikie-Rick's unlawful discharge** and, **WE WILL**, within 3 days thereafter, notify him in writing that we have done so and that the discharge and warning will not be used against him in any way.

**Sandra Parker, Clyde Gibb and  
Fort Sutter Company,  
d/b/a BEST WESTERN SUTTER HOUSE**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

### **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5138.